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April 22 2010

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA- 10-0071

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

George William Parrish,
Defendant and Appellant,

FILED

APR 22 2010

vs

State of Montana,
Plaintiff and Appellee.

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

BRIEF OF APPELLANT

ON APPEAL FROM THE MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
FLATHEAD COUNTY, HONORABLE TED LYMPUS PRESIDING

Appearances:

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Montana Constituton		throughout
Order denying Appellants Motion to Amend		attached

STATEMENT OF ISSUES

1. Did the District Court have Jurisdiction to Amend Defendants Judgment due to the illegal administration of defendants sentence?
2. Were Defendants 5th Amendment Rights violated when he was compeled to admit to elements of his sexual offense he is incarcerated for or face removal from groups, thus making him ineligible for parole, revocation of his suspended sentence and open to purjury charges?
- 3.. Was Defendant denied equal protection of the laws when he was treated differently than others in the same or similarly situated situation or position, thus violating his 14th Amendment right to the U.S. and State of Montana COnstitution?
4. Was Defendant denied due process of the law for not being allowed to attend a hearing on his removal from treatment from a court of law or the administrative hearing when other options were available to defendant?

Statement Of The Case

On September 18, 2003, George William Parrish, Hereinafter Defendant was convicted by a jury of 2 counts of Sexual Intercourse without Consent (45-5-503) and 2 counts of Sexual Assault. (45-5-502)

From the day of his arrest through trial, sentencing and continuing to this day defendant has preserved and maintained his innocense and reserved his 5th Amendment rights against self-incrimination.

On December 22, 2003 this defendant was sentenced to 60 years with 25 years suspended. Defendant appealed his sentence and on May 23, 2005 the Montana Supreme Court denied defendants appeal but remanded the case for reassessment of witness costs at trial. Defendant filed postconviction relief on December 5, 2006 and after being denied at the District Court level this defendant appealed. (DA 06-0166) The Montana Supreme Court denied defendants post conviction relief.

ON January 8, 2004 Defendant completed Phase One of the prisons Sexual Offender Program and on August 3, 2009 the Defendant started Phase Two. Prior to attending Phase Two this defendant explained to his therapist his fifth amendment privileges and at this time it was explained to the defendant could continue in Phase Two without admitting to any conduct surrounding his instant offense. He could admit to some conduct, any conduct that rises to the level of a sexual offense. For almost 3 months defendant was allowed to attend Phase Two of the Sexual Offender Program and participated in group while presenting assignments. In early November Defendant was confronted by his Therapist and told he was in danger of being removed from group for failure to admit to sexual wrong doing concerning his instant offense.

Defendant was given three options by his group facilitator and the Head treatment facilitator of the Sexual Offender Program at Montana State Prison. Defendant chose one of the given options (admit to behavior that rises to the level of a sexual offense) but was removed from group treatment Phase Two anyway. After writing a series of letters to the treatment facilitators at Montana State Prison defendant was still not allowed to return or participate in the treatment phase of the sexual offenders program.

On December 11, 2009 Defendant filed a Motion to Amend his Judgment in the Eleventh Judicial District Court. The defendant's motions were ultimately denied by the lower court and it is from that denial that this defendant appeals.

Statement Of The Facts

Appellant was Court Ordered to complete the treatment phase (phase two) of the prison's sexual offender treatment program prior to parole eligibility. On August 3, 2009 Appellant began phase two and participated in that until he was confronted by his therapist and given three options. Appellant wrote a letter (Exhibit A) and submitted that letter the week of 11-17-2009. The week of 11-13-2009 appellant was removed from group even though he has complied with the terms and conditions of one of the options given to him by his therapist. On 11-13-2009 appellant sent Exhibit B to Blair Hopkins administrator of the SOP program at MSP. The next day he received the reply. Appellant also received the service notes from the primary therapist of his during group. This is Exhibit C that outlines a willingness by appellant to obtain whatever is possible and of benefit from the group short of admitting wrongdoing to his instant offense. Exhibit C-2, C-3, C-4 are also relevant parts that show Drew requiring Appellant to admit against his 5th amendment privilege. After receiving the responses and finding the Kelly Dale Clark case appellant wrote Exhibit D and outlined the history, the options he was given by Drew, the testimony by Blair Hopkins that Clark could continue in a group on the option that he admit to some conduct but not necessarily instant offense conduct. This was stipulated testimony and appellate wanted to exhaust this avenue before heading to court for relief. Exhibit E is a copy of the Order vacating Defendant Clark's Judgment and setting the matter for resentencing. Page two of State v Kelly Dale Clark Line 5 states, IN that statement, it is Hopkins (Blair) the administrator of the sex offender treatment program at the prison, that "the defendant is not required, as a condition of participation in phase 2 of the program, to discuss the specifics of the charge for which he was convicted. However, the defendant is required to admit to some conduct--either the offense for which he was convicted or some other conduct--which amounts to sexual offense. Failure to do so means the defendant is not eligible to finish phase two of the program" AS the court can plainly see, this appellant did what he could to comply with all asked of him during phase two. Unreasonable expectation, disregard for appellants rights and illegally administration of this appellants sentence by the DOC leads to this appeal.

STANDARD OF REVIEW
Citation of Authorities

1. Jurisdiction is defined by law. Vannatta v Boulds, 2003 MT 342. Where the issue is whether the court had authority to take a specific action, however, "the question is one of law over which review is plenary. State v Nelson, 1998 MT 227. This Court has original jurisdiction over this case. The Supreme Court generally reviews a district courts denial of a motion under the abuse of discretion standard. 197 P.3d 997, 347 Mont. 113 State v Clark; Timothy Allen Hamm v Mike Mahoney 2000 ML 1338 (2000)
2. Violation of 5th Amendment and being compelled to admit to elements of offense convicted of or face removal from treatment and face additional incarceration time for invoking 5th Amendment claims. State v Imley 249 Mont. 82; U.S. v Antelope 395 F3d 1128 (9th Circuit 2005); State v Fuller 276 Mont. 155; United State Constitution
3. Equal Protection of Laws ; State v Kelly Dale Clark 347 Mont. 113; State v. Lee 2001 MT 176; State v Sheppard 277 Mont. 76; State v Williams 1999 MT 240; 14th Amendment U.S. Constitution
4. Denial of Due Process; Due process is protection of individuals against arbitrary action of the government. Wolf v McDonnell (1974) 418 U.S 539; Procedural due process is required when a party makes a showing that a liberty interest exists. State v Egdorf 2003 MT 264; State v Webb 2005 MT 5; State v McLeod 2002 MT 348.

Legal Arguments

Summary

The Appellant motioned the District Court for relief from oppressive conditions being placed against him by the Department of Corrections, Montana State Prison and the Sexual Offender Treatment Unit. Although his sentence was legal when pronounced the sentence becomes illegal in its administration thus the District Court has authority to clarify and modify said sentence. Appellants 5th Amendment rights to not be compelled to admit to elements of his convictions are being violated by the treatment program appellant was enrolled in. This sexual offender treatment program demanded admission or face removal from treatment. Similarly situated offenders were allowed a host of options when it regarded status and participation in treatment and when appellant was given several options to choose from he chose an option and was removed from group anyway. Appellant was also denied his due process rights when he should have been allowed to attend a "secret meeting" and defend his decisions. Treatment providers excluded his input and ability to defend himself and made decisions to remove him with out due process protections.

1. The District Court has jurisdiction to amend Appellants judgment due to the illegal administration of the sentence by the department of Corrections.

No statute authorizes the sentencing judge to grant authority to the Department of Corrections to modify a sentence by imposing subsequent constitutional infringements after the judgement and sentence have been signed. This Court has consistently ruled that the district court is without statutory authority to delegate its sentencing authority to the Department of Corrections. State v Field 2000 MT 268; ¶15; State v Hatfield (1993) 256 Mont. 340, 346. Section §46-18-103, MCA vests the district court with exclusive authority to impose a sentence on defendants, State v Millinovich (1991) 248 Mont. 373. Any conditions or additional provisions placed upon the appellant by the Department of Corrections that violate appellants rights illegally infringes on appellants rights and it is incumbent upon the district court to clarify and correct the wrongs imposed upon him by the departments illegal administrations.

2. Violation of 5th Amendment rights violated for being compelled to admit to elements of his current conviction or face removal from a treatment group that he is required to complete prior to being parole eligible.

Appellant should be protected from compelled self-incrimination. Appellate enjoys constitutional protection from self-incrimination, regardless of who he is and how he is situated. This privilege extends beyond trial, custodial situations and extends to persons already convicted of crimes. The lower court record is full of background and exhibits clearly showing that the DOC, MSP and sexual offender treatment program therapists and administrator compelled and required admission of and disclosure of offense history and prior criminal acts. The Montana Constitution and the U.s Constitution guarantee protection from the very same actions the DOC, MSP and sex offender treatment staff required of Appellant. Appellant has, from arrest, trial and to date, affirmatively invoked his 5th Amendment privileges to no avail. An analysis of the lower court record will show a classic penalty situation with regards to Appellant.

3. Equal Protection of the laws. This Appellant is entitled to be treated the same as similarly situated offenders.

Appellant motion the district court to allow him the same relief given to other similarly situated offenders. Kelly Dale Clark 247 Mont. 113, DC-02-99 in an August 4th, 2006 Order allowed Clark to go to resentencing and remove the Phase Two requirement from Clark's parole eligibility. This resentencing

Order was done over 3 years past his sentencing date. In State v Sheppard, 277 Mont. 76, a motion was filed in the district court asking the court to place Sheppard into the phase two treatment program despite his failure to admit guilt to his current conviction. In State v Lee 2001 MT 176 (2001) the Court ruled that it is fundamentally unjust to punish someone and restrict their liberty due to conditions beyond their control. Appellant, like Lee has done everything asked of him short of admitting to elements of his current criminal conviction. Beyond that he has did everything in his power to diligently complete the phase two treatment program. As a direct result of appellants failure to admit to his current conviction he was removed from treatment and listed as noncompliant with treatment. By failing to allow appellant to participate in the treatment program frustrates the purpose of his sentence, namely rehabilitation. As highlighted in the lower court, Appellant was not required by his judgment to admit guilt in his instant offense. Clearly other options than removal of appellant from group have been offered to offenders in similar situations and this appellant must be allowed the equal protection of the laws to give him the same treatment as given other similarly situated offenders.

4. Denial of Due Process. This appellant is entitled to due process of the law whenever he needs to explain, argue or rebut any information that is discussed or used in making a treatment decision that adversely effects appellants treatment completion, parole eligibility and release opportunities.

The lower court record clearly and plainly outlines the steps and direction this appellant took to be included and attend the "secret meetings" held by the sexual offender treatment program staff when they discussed this appellants ability to participate and continue in phase two of the sexual offender treatment program. The material relied upon or assumed facts presented by one treatment provider to the treatment administrator lacked anyway to have the appellant represent himself. At this meeting decisions were made about appellant participation in treatment without his being present to correct, rebut or deny. Basic due process rights implore the court to decide if a due process right existed and if so then decide what process is due. McLeod¶19; State v Herman 2008 MT 187; State v Rosling 2008 MT 62. Due to not having the right to be present and contest, correct or argue for a different treatment status designation implicates this appellants right to procedural due process and the court can reach no other conclusion than to order a hearing on remand to ensure appellants rights are preserved and protected.

Defendant Prays this Court grant:

1. Vacate Defendant/Appellants Judgment and Commitment Order of December 22, 2003.
2. Remand Defendants/Appellants case for resentencing hearing with assistance of counsel to remove requirement of completion of Phase Two of the State Prisons SOP Program prior to parole eligibility.
3. Appointment of counsel to assist in preserving Defendants 5th Amendments and 14th Amendment rights.
4. Remand for hearing to preserve Defendants right to equal protection and due process.
5. Any other relief this court deems necessary and proper.

4-19-10
Date

George W. Parrish
George William Parrish, Appellant

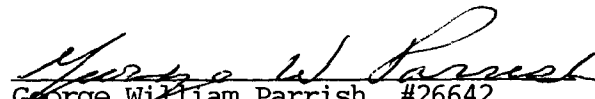
CERTIFICATE OF SERVICE

I, George William Parrish, Appellant in the above entitled cause hereby certify that I have mailed a true and correct copy of the above appeal brief to the below listed by depositing it in the U.S. Mail postage, prepaid:

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PO BOX 1516
Kalispell MT 59903-1516

4-19-10
DATE


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Jan - 20 - 2010

IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD

STATE OF MONTANA,) Cause No. DC-01-355A
)
Plaintiff,) ORDER DENYING DEFENDANT'S
) MOTION TO AMEND JUDGMENT
vs.)
)
GEORGE WILLIAM PARRISH,
Defendant.

COPY

THIS CAUSE is before the Court on the Defendant's Motion to
Amend Judgment; on the basis of said motion, and supporting and
opposition memoranda, and the Court having fully considered all
of same and being fully advised; Now therefore

IT IS HEREBY ORDERED that the Defendant's Motion to Amend
Judgment, is DENIED.

Rationale

A judgment may be modified within 120 days of the final
pronouncement of sentence (46-18-116, MCA). In this case that
date would be 120 days from December 13, 2006, when the amended
Judgment was filed in this case pursuant to the Supreme Court
Order of May 23, 2005. The Court can correct a factually

1 erroneous Sentence or Judgment at any time. However, the
2 Defendant's claim is not a factual one. Illegal sentences must
3 be addressed in the manner provided by law for appeal and
4 postconviction relief (46-18-116, MCA), both of which time to
5 file has run in this case.
6

7 It is well settled that it is within the District Court's
8 power to enter an Order amending a Judgment to remedy certain
9 clerical errors. State v. Winterrowd, 1998 MT 74, 288 Mont. 208,
10 957 P.2d 522 (1998). The error must be apparent on the face of
11 the record to insure that the correction does not in effect set
12 aside a Judgment actually rendered nor change what was
13 originally intended. State v. Owens, 230 Mont.135, 748 P.2d 473
14 (1988). In the instant case the Defendant is requesting a
15 change that would alter what was originally intended by the
16 Court; he is requesting that the parole restriction that he
17 complete phase II of the Sex Offender program be removed.
18 Therefore, the Defendant's Motion is time-barred under 46-18-
19 116, MCA.
20

21 The Defendant asks in the alternative for a re-sentencing.
22 The District Court has no jurisdiction for that request.
23 Jurisdiction is defined by law...Jurisdiction cannot be conferred
24 by consent of the parties or the Court...Once a valid sentence
25 is imposed, the District Court lacks jurisdiction to modify that
26 sentence absent specific statutory authority. State v. Evert,
27
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1 2004 MT 178. This being a valid sentence the Court has lost
2 jurisdiction and cannot grant the Defendant's requested relief.
3
4

5
6 DATED this 20th day of January, 2010.

7 
8 District Court Judge
9

10 cc: Lori Adams, Deputy
11 George William Parrish
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